

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Date Issued: August 21, 2001**

**BALCA Case No. 2000-INA-235**  
[ETA No. P1997-NY-02110015]

*In the Matter of:*

**IGOR BUKETOFF,**  
*Employer,*

*on behalf of*

**MARIANNA BALCER,**  
*Alien*

Certifying Officer: Dolores DeHaan, New York, NY

Appearances: Margaret Kesy  
Brooklyn, NY  
For Employer

Before: Burke, Vittone and Chapman  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This matter arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Domestic Cook. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review and any written arguments. 20 C.F.R. 656.27(c).

**STATEMENT OF THE CASE**

On February 5, 1997, Employer, Igor Buketoff, filed an Application for Alien Employment Certification seeking to fill the position of "Domestic Cook (Live-out)." (AF 1-2,15-16). The duties were listed as follows:

Prepare and cook natural food dishes. Mix & cook ingredients for products that are wheat-free, dairy/oil/sugar-free vegetarian. Cook products such as pumpkin filling, sweet potato filling from scratch for use in desserts. Purchase foodstuff. Clean kitchen.

(AF 16). Employer required two years of experience in the job offered. *Id.*

On June 10, 1999, the CO issued a Notice of Findings ( "NOF"), noting that "the requirement that applicants have experience in a particular type of ethnic/religious food is employer's personal preference and not a normal job requirement." (AF 32). The CO, therefore, advised Employer to either delete the restrictive requirement calling for the applicant to have two years of specialized experience in the preparation of vegetarian food or submit evidence to show that a business necessity warranted the requirement pursuant to § 656.21(b)(2). (AF 32). The CO also questioned whether the position presented a bona fide job opportunity under § 656.20(c)(8). (AF 33).

Employer filed his Rebuttal to the NOF on July 13, 1999 (AF 38-51). The Rebuttal primarily consisted of answers to the twelve questions presented in the NOF regarding the existence of a bona job opportunity and did not explicitly address the business necessity issue. *Id.* However, Employer did allude to the business necessity issue by maintaining that he frequently needs to entertain "business clients, partners, lawyers, bankers and financial advisors." (AF 51). He also asserted that his guests "prefer to be entertained by domestic cook rather than [sic] restaurant worker." *Id.* In addition, Employer submitted his entertainment schedule for the preceding year. Employer appears to have entertained about three times per week (AF 40-51).

On January 5, 2000, the CO issued her Final Determination ("FD"), denying the application on the ground that Employer failed to submit requested evidence to support the business necessity of the ethnic cooking requirement. (AF 54A-B).

On February 15, 2000, Employer filed a Request for Administrative Judicial Review of Denial of Labor Certification. (AF 75-77). Neither a statement of position nor a legal brief has been received since the case was docketed before this Board.

## **DISCUSSION**

In *Martin Kaplan*, 2000-INA-23 ( July 2, 2001) (*en banc*), the Board held that "cooking specialization requirements for experience in specific styles or types of cuisine are unduly restrictive within the meaning of the regulation at section 656.21(b)(2), and therefore must be justified by business necessity." *Kaplan*, 2000-INA-23, slip op. at 3. To establish business necessity under section 656.21(b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer.

*Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). In the context of domestic cook specialization requirements, the first prong of the business necessity test may often focus on how the cooking specialization is related to the family's need for a cook. The second prong of the test may often focus on whether the length of experience stated by the employer as a job requirement is required to be able to cook the specialized cuisine. *Kaplan, supra* slip op. at 10.

In the NOF, the CO informed Employer that he may rebut her finding that the requirement for a cook with two years' experience preparing vegetarian cuisine was unduly restrictive by providing evidence that:

- 1) An applicant with two years of cooking experience could not readily adapt to a vegetarian style of cooking;
- 2) An applicant with no prior experience in vegetarian cooking is incapable of preparing vegetarian food; and
- 3) Neither Employer nor anyone else in his family is able to provide training or instruction in the vegetarian cooking tradition.

(AF 32).

Employer, however, failed to provide any such evidence to establish that the job requirements are essential to the performance of the job duties. In his Request for Review, Employer explained that he would be uncomfortable hiring a cook with less than two years' experience because an inexperienced cook would not be able to "take full control of all the cooking tasks." (AF 77). Normally, an employer's unsupported assertions are not sufficient to carry its burden of proof, but are evidence that must be considered and given the weight it rationally deserves. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). However, here, Employer's assertion carries little weight since it is not accompanied by supporting reasoning or concrete evidence. Therefore, Employer's statement fails to prove that an otherwise experienced domestic cook is unable to learn how to cook vegetarian dishes within a reasonable period of taking the job.

Employer also stated in his Request for Review that the CO should have ascertained from the description of Employer's work schedule in the Rebuttal that he and his spouse are too busy to train a cook. (AF 77). Incapacity to provide training, however, does not furnish evidence relating to the length of time it takes to gain competency in vegetarian cooking. Nor does it suggest that someone without experience preparing vegetarian dishes cannot learn how to prepare the cuisine via another method, such as through the consultation of cookbooks. Thus, in light of the foregoing, the two year specialization requirement remains unduly restrictive since Employer has not sufficiently linked the requirement to successful execution of the job.

## **ORDER**

Since we find that Employer has not documented that two years of experience in the cooking specialization is supported by a business necessity, we **AFFIRM** the CO's Final Determination denying alien labor certification.

**SO ORDERED.**

Entered at the direction of the Board by:

Todd R. Smyth  
Secretary to the Board of Alien Labor  
Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400  
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.